Nos. 12195 and 12196

In the United States Court of Appeals for the Ninth Circuit

BRUCE G. BARBER, DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION SERVICE, APPELLANT

v.

TADAYASU ABO, ET AL., ETC., APPELLEES

BRUCE G. BARBER, DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION SERVICE, APPELLANT

v.

MARY KANAME FURUYA, ET AL., ETC., APPELLEES

ON APPEALS FROM ORDERS OF THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

APPELLANT'S REPLY BRIEF

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APPELLEES' SUGGESTION THAT THE DECISION OF THE DISTRICT COURT SHOULD BE AFFIRMED ON THE AUTHORITY OF AHRENS v. CLARK

At page 14 of appellees' brief they appear to suggest that by reason of the fact that they did not remain within the territorial jurisdiction of the District Court throughout the proceedings below, the District Court lacked jurisdiction and therefore this Court should affirm its decision. This argument, which plainly

leads to reversal rather than affirmance, is clearly erroneous. Unlike the case of *Ahrens* v. *Clark,* 335 U. S. 188, this case was commenced in the district in which the relators were interned under alien enemy removal orders. Accordingly, the District Court had jurisdiction, by *habeas corpus,* to inquire into the legality of the custody as of the time of the commencement of the suit. Thereafter a stipulation and order was filed on March 14, 1946,[1] which provided in part that "the plaintiffs * * * who shall be transferred, in custody, for the convenience of the Government, to an internment camp or place of restraint other than the Tule Lake Center * * * whether the same be situated at Santa Fe, New Mexico, Crystal City, Texas, or elsewhere, will be produced before the above-entitled Court for hearing for trial purposes in the above-entitled suit, upon reasonable notice, by the United States Government, the Attorney General of the United States, or Ivan Williams [predecessor in office of present appellant] as their agent." That transferral of the appellees from the district under this arrangement did not divest the Court of jurisdiction is, we submit, established by the decision of the Supreme Court in the case of *Ex parte Endo,* 323 U. S. 283, 304–307. There can be no question but that the appellees were released from custody by the Court below by a decision that was thoroughly and vigorously contested (R. 175–194). As recited in the

[1] This instrument is set forth in the record in No. 12251 herein, at pp. 86–87. See footnote No. 1 in the Appellants' brief in the case of *McGrath* v. *Abo,* No. 12251, as to the consolidation of that case with the instant *habeas corpus* causes in the Court below.

actual order releasing the appellees from custody (R. 195–196) the appellees moved that they be released in the custody of their attorney without the necessity of producing them "in person before this Court on September 8, 1947," as had been provided for by the writ (R. 194), in order to avoid the "hardship upon them" and "needless expense to * * * the United States" and the respondent consented to this arrangement (R. 196–197). This consent, however, was not that the appellees should be released but rather that, since the Court had decided to release them, they might be released in a particular fashion. The consent was conditioned, moreover, that it should be "without prejudice to respondent's right of appeal in the above cause" (R. 196). This appeal does not complain of the failure of the District Court to take the personal recognizance of each appellee in accordance with Rule 45 (3) of the Rules of the Supreme Court, but is from the judicial action releasing them at all. Since the District Court had jurisdiction at the time of taking the action appealed from, and since, in the event of the success of the appeal custody over the persons of the appellees will be resumed, the causes are not moot and this Court has jurisdiction. *Eagles* v. *Ex rel Samuels,* 329 U. S. 304, 306–308.

THE POSTURE OF THE CAUSES AND QUESTIONS PRESENTED BY THIS APPEAL

Statements and arguments throughout appellees' brief lead to the impression that they assume that the decision of the District Court should be treated as having been reached after full trial on the merits. For example (at p. 28), they contend that the appel-

lant introduced no evidence in support of the averment that appellees are citizens of Japan and argue (in a footnote) that an affidavit concerning the law of citizenship of Japan is not sufficient for that purpose since it does not show "the application of any foreign law to any of the appellees." What the appellees overlook is the fact that none of the issues of fact made out by the pleadings below was tried or decided by that Court.

These *habeas corpus* proceedings were decided upon petitioners' motions for summary judgment and judgment on the pleadings (R. 154–160), and upon respondent's cross motion for summary judgment (R. 161). Here, unlike the action taken in Nos. 12251 & 12252 herein, there was no stipulation submitting the *habeas corpus* proceedings for decision on the merits. Moreover, nothing in the opinion of the District Court (R. 174–177), or in any order or action entered or taken by it, indicates that the Court intended to decide any issue of fact one way or the other.

The only question that the District Court decided, in granting appellees' motions was that they were not, within the contemplation of the domestic law of the United States, citizens of Japan prior to their renunciations of United States citizenship and, therefore, did not thereby become alien enemies. This decision was reached on legal and not factual grounds and the issues of fact raised by the pleadings were not resolved. Obviously, for the purpose of the appeal, it must be assumed that the appellant is in position to sustain each of his factual averments and denials.

THE APPELLEES' ARGUMENTS THAT ARE WITHIN THE SCOPE OF THE APPEAL

The appellees' contentions concerning the questions of dual nationality and the applicability of the Alien Enemy Act to a renunciant, are, we believe, sufficiently covered by the appellant's main brief herein. The contentions to the effect that the period, within which the Alien Enemy Act was effective, expired with the end of hostilities is sufficiently answered, we believe, by the case of *Ludecke* v. *Watkins,* 335 U. S. 160, cited at p. 46 of their brief.

The contentions to the effect that Congress lacked power to authorize dual nationals to cast off their United States citizenship and thereby become solely nationals of a foreign power, are, we submit, clearly fallacious.

Since we insist that dual nationals have a right to elect United States citizenship (*Perkins* v. *Elg,* 307 U. S. 325) it is difficult to believe that the Constitution deprives the Congress of authority to authorize voluntary rejection of United States citizenship in favor of that of a foreign power. The Congress admittedly has constitutional power to authorize voluntary renunciations by persons when they are abroad and we are aware of no provision of the Constitution which would deny it such power in cases of persons in this country. The appellees' brief points to no constitutional provision or authority requiring such a result.

The contention (pp. 58–61) to the effect that the renunciations of persons between the ages of 18 and 21 were ineffective because such persons were under legal disability, has been met in appellants' opening

brief in *McGrath* v. *Abo,* No. 12251, at pp. 83–97, to which the Court is respectfully referred.

CONCLUSION

For the reasons stated in appellant's opening brief herein, the decision of the District Court herein should be reversed.

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